
Appeal Board/Agency Shop Developments – 2005

Public Employment Relations Commission

Appeal Board

Don Horowitz
Counsel

Public Sector

***Mitchell et al. v. City of Philadelphia et al.*
2004 U.S. Dist. LEXIS 20349 (E.D. PA)**

The majority representative did not provide nonmembers with the notice required by *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986) until 22 months after beginning agency fee deductions. Current and former employees sued the City and an AFSCME local, alleging that the absence of an advance notice violated their constitutional rights. They also alleged that the notice that was later provided was inadequate. The Court holds that the notices contained the information nonmembers needed to determine whether they wanted to challenge the expenditures financed by the fees. However, the Court rules that the late notice did not cure the violation of *Hudson's* constitutional requirement that the information be provided in advance.

Citing *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992), the Court also declines to void,

as contrary to public policy, the indemnification clause in the agreement. The plaintiffs argued that the clause would allow the City to ignore whether the Union was meeting its *Hudson* obligations. The Court responds that the potential for an award of attorneys fees and court costs in a [42 U.S.C. §]1983 action would provide sufficient incentive for the employer to monitor compliance with *Hudson*. The issue of damages was remanded for trial.

***Robinson and Dino v. Pennsylvania State Corrections Officers Association*, 299 F. Supp. 2d 425 (M.D. PA 2004)**

***Robinson and Dino v. Pennsylvania State Corrections Officers Association*, 2005 U.S. Dist. LEXIS 1552, 176 L.R.R.M. 2717 (M.D. PA 2005)**

In 2004, the District Court (299 F. Supp. 2d 425) held that a newly certified union was not excused from providing a *Hudson* notice to nonmembers before collecting an agency shop fee. After replacing a decertified union and pursuant to its contract with the Commonwealth, fair

share fees were deducted from the salaries of nonmembers.

The Association set the fee by reviewing the expenses of its predecessor but it did not send out a *Hudson* notice. The Court rejects the Association's argument that as a new union it had no history of expenditures on which to base its fee and should not have to provide a *Hudson* notice for its initial collection of fair share fees.

In its 2005 decision, the Court reviews the adequacy of the Association's March 2003 notice issued prior to fee collections that began a few months later. The Court finds that the Association complied with the independent verification requirement, and provided specific financial information, in a form even more detailed than *Hudson* requires. However, the Court finds the notice to be inadequate because it shows that the Association has improperly calculated the fee. Citing *Wessel v. City of Albuquerque*, 327 F. Supp. 2d 1332 (D.N.M. 2004)(discussed below), the Court holds that nonmember fees are to be used for current chargeable expenses, and that the method used by the Association could allow it to improperly maintain a financial reserve based, in part, on nonmember fees.

***Wessel v. City of Albuquerque*, 327 F. Supp. 2d 1332 (D.N.M. 2004)**

The District Court, acting on remand from a 2002 ruling of the United States Court of Appeals for the Tenth Circuit (299 F.3d 1186), reviews the fair share fees assessed by an AFSCME local that also include amounts distributed to state and national affiliates. The Court of Appeals voided an indemnification clause in the City- AFSCME contract, holding that a government employer shares responsibility with the majority representative to ensure that rebate procedures are not constitutionally infirm. Deciding whether the expenditures of the AFSCME local's state and national affiliates were germane to collective bargaining, the Court holds that AFSCME did not meet its burden of proof. It rules that AFSCME's definition of chargeable activities does not square with *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

***Harrington, et al., v. City of Albuquerque*, 329 F. Supp. 2d 1237 (D.N.M. 2004)**

In a class action, the District Court finds that the *Hudson* notice provided by AFSCME is inadequate, but awards only nominal damages. The notice did not include an auditor's report and did not explain the

allocation of dues and fees among the three levels of the union. Pursuant to its decision in *Wessel*, the Court holds that AFSCME did not meet its burden and orders a refund of all fair share fees. It remands a punitive damages claim for trial, finding there were issues of fact as to whether the union officials who prepared the *Hudson* notice took any action to protect nonmembers' constitutional rights. The Court also holds the indemnification agreement cannot protect the City from suits related to fair share fees.

***Cummings v. Connell*, 2005 U.S. App. LEXIS 4954 (9th Cir. 2005)**

The Court of Appeals reverses a District Court ruling on nominal damages and attorneys fees in a class action suit involving approximately 37,000 state employees who are not members of the unions that represent them. In a 2003 decision (316 F.3d 886), the Court of Appeals held that state unions had failed to comply with *Hudson*. But it reversed as over-broad a million-dollar award of restitution of the nonchargeable portion of the fee to all class members. On remand, the District Court awarded \$1.00 in nominal damages only to the seven named class representatives. The nonmembers appealed asserting that each of the 37,000 class

members should receive nominal damages. The Court of Appeals, citing *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992), agrees that all members of the class are entitled to nominal damages. It also reverses and remands an award of attorneys' fees for recalculation in light of the modified damage award.

***Madsen v. Associated Chino Teachers*, 317 F. Supp. 2d 1175 (C.D. CA 2004).**

California law provides that a public employee with a religious objection to paying dues or fees to a labor organization can instead make a charitable contribution in an amount equivalent to the service fees assessed by the majority representative organization. The Association allowed a religious objector to make a charitable contribution in an amount equivalent to normal membership dues of \$782.00. Bargaining unit members who had objected (on nonreligious grounds) to union expenditures not germane to collective bargaining and contract administration were assessed an agency fee of \$484.74. The religious objector filed a claim with the Equal Employment Opportunity Commission and a federal court action asserting that making her pay more than the agency shop fee was religious discrimination.

As all employees receive union representation, the Court reasons that exceptions to the duty to pay membership or service fees should be narrow. Concluding that the fee arrangement violates no constitutional guarantees, the Court dismisses the suit. It finds that a religious objector is different from employees who object to paying for "non-germane" expenses. It holds that if the religious objector paid the reduced fee to a charity of her choice, "she would receive more favorable treatment than any other group of employees because she would receive the benefits of representation and yet maintain control of the use of her money."

Private Sector

White v. CWA, Local 13000, 370 F.3d 346 (3rd Cir. 2004)

The Court of Appeals rejects a private sector employee's claim that the authorization for agency shops in 29 U.S.C.A. §158(a)(3) constitutes "state action." Thus, it affirms the District Court's ruling that CWA's alleged failure to adopt the procedures required by *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) did not raise a First Amendment issue.

The decision notes that although the National Labor Relations Act provides a framework that authorizes the creation of an agency shop through collective bargaining, it does not mandate union security agreements. The Court distinguishes Railway Labor Act agency shops because that law overrides state law. Thus *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), held that, such clauses bore "the imprimatur of federal law," and their implementation constituted state action. It notes that decisions in other circuits have held that state action is present in cases involving similar facts and issues, but declines to follow and apply them.